No. 83124-6

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM
THE UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF WASHINGTON

IN

MATTHEW CUDNEY,

Plaintiff,

v.

ALSCO, INC., a Nevada corporation,

Defendant.

ALSCO'S RESPONSE TO (1) THE DEPARTMENT OF LABOR & INDUSTRIES, STATE OF WASHINGTON, (2) WASHINGTON EMPLOYMENT LAWYERS' ASSOCIATION, AND (3) WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION'S AMICUS CURIAE BRIEFS

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I. INTRODUCTION

On December 21, 2009, the Court permitted Department of Labor and Industries, State of Washington ("L&I"), the Washington Employment Lawyers Association ("WELA"), and the Washington State Association for Justice Foundation ("WSAJ Foundation") to file amicus curiae briefs. It permitted ALSCO until January 4, 2010, to submit its response to these briefs.

Plaintiff Matthew Cudney does not ask this Court to overrule or expand any of its prior wrongful discharge cases. Rather, Cudney attempts to distinguish the Court's decision in Korslund v. DynCorp Tri-Cities Services, Inc., 156 Wn.2d 168, 125 P.3d 119 (2005), and claims Wilmot v. Kaiser Aluminum, 118 Wn.2d 46, 821 P.2d 18 (1991), is the most relevant authority. ALSCO refuted these assertions in its initial brief filed in July 2009.

In contrast to Cudney's position, L&I, WELA and the WSAJ Foundation all ask this Court to revisit and broaden the jeopardy element of a wrongful discharge claim. In particular, each either explicitly or implicitly asks the Court to overturn key aspects of its 2005 decision in Korslund or create unjustified and previously unrecognized distinctions in types of wrongful discharge claims. Not only do these arguments conflict with the well-recognized doctrine of *stare decisis*, they reflect new legal

arguments not previously advanced by Cudney. It is settled that new issues cannot be raised by amicus curiae.

There is no evidence in the record (or elsewhere) that the remedies created by the Washington Legislature are inadequate to protect the public policies at issue. As this Court has repeatedly held, a wrongful discharge claim will be recognized only if an available remedy is inadequate to protect the public policy. As the focus of the inquiry is on the protection of the public policy, the available remedy need not afford an allegedly aggrieved citizen all possible remedies. If this Court judicially decrees that the legislatively defined remedies are inadequate, it improperly usurps the Legislature's proper Constitutional role.

Neither Cudney nor amici have shown that the remedies provided by the Legislature are inadequate to protect the public policies in this case. Amici seek to greatly expand the tort of wrongful discharge in violation of public policy by focusing on the alleged injury to the employee, rather than the adequacy of the remedy and protection of the public policy. They seek to transform a claim of wrongful discharge in violation of public policy from a tort that represents a "narrow" exception to the at-will doctrine, to an expansive tort that focuses on full compensation for aggrieved employees. Amici's attempt to expand the law should be rejected.

II. STATEMENT OF THE CASE

ALSCO incorporates by reference its Statement of the Case, set forth in its Response Brief filed in on July 13, 2009.

III. ARGUMENT

A. New Legal Arguments Cannot Be Raised by Amici.

It appears that to one degree or another, Amici ask this Court to significantly expand the tort of wrongful discharge in violation of public policy. In so doing, they ask the Court to overrule and or modify key portions of prior holdings, something Cudney has not asked the Court to do. The Court will not consider points raised first and only by amicus curiae. Main Farm Homeowners' Association v. Worthington, 121 Wn.2d 810, 826, 854 P.2d 1072 (1993). To the extent Amici raise issues not presented by Cudney, they should not be considered.

B. ALSCO's Response to WSAJ Foundation's Amicus Brief.

1. Cudney and Amici Cannot Show that WISHA Provides an Inadequate Protection of Public Policy.

As pointed out by the WSAJ Foundation, this Court has recognized that in order to prove the jeopardy element in a wrongful discharge case, plaintiffs must show that they engaged in particular conduct, and that (1) the conduct ***directly relates*** to the public policy or (2) was ***necessary*** for the effective enforcement of the public policy. WSAJ Foundation's Brief

at p. 5. The WSAJ Foundation recognizes that under current law, as confirmed by several decisions of this Court, this "burden requires a plaintiff to argue that other means of promoting the policy ... are inadequate." Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 945, 913 P.2d 377 (1996). See also Korslund v. Dyncorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 181, 125 P.3d 119 (2005) and Danny v. Laidlaw Transit Services, Inc., 165 Wn.2d 200, 223, 193 P.3d 128 (2008). In Danny, the Court seemed to take the analysis one step further, holding that an employee must show that his-her conduct was "the *only available adequate means*" to protect the stated public policy. Danny, 165 Wn.2d at 223 (emphasis in original).

The WSAJ Foundation asks this Court to "retrace its steps" in these well-established wrongful discharge in violation of public policy cases. Specifically, it asks the Court to reverse itself, now holdings that an employee need only show that alternative means for promoting public policy are inadequate in the "necessary for the effective enforcement" category of cases. WSAJ Foundation's Brief at page 9. It claims that "[l]ogically, the question of alternate means arises only in connection with consideration of this type of claim because here the employee must satisfy the *necessity* of his or her conduct." Id. Thus, the WSAJ Foundation asserts that "it does not matter whether Cudney had other avenues of

reporting safety violations" (WSAJ Foundation's Brief at p. 19), and that it "should not be relevant whether alternate means of promoting the policy embodied in WISHA are adequate." WSAJ Foundation's Brief at p. 6.

First, the Court need not address the distinction made by the WSAJ Foundation, as Cudney has not claimed his conduct directly related to the public polices at issue, in contrast to being necessary for the effective enforcement of the stated public policies. Indeed, Cudney concedes that to satisfy the jeopardy element, he must prove that alternative means of protecting public policy are inadequate. His position is that both WISHA and Washington's DUI laws are inadequate. The "direct relationship" versus "necessary for the effective enforcement" distinction is made only by the WSAJ Foundation. This Court will not consider points raised first and only by amicus curiae. Main Farm Homeowners' Association, 121 Wn.2d at, 826.

If the Court is inclined to entertain the WSAJ Foundation's invitation to re-examine the jeopardy analysis, it should reject the proposed bifurcation of burdens. Under the WSAJ Foundation's proposed framework, where there is a "direct relationship" between the employee's conduct and the public policy, there is no need to show that other means of protecting public policy are inadequate, because by terminating an

employee for such "policy-based conduct," public policy is necessarily jeopardized.[1] This is not necessarily the case.

In a direct-relationship case, the touchstone of the inquiry must remain whether the underlying public policy is jeopardized. That is, a plaintiff must show that discouraging the conduct in which they engaged would jeopardize the public policy. Gardner, 128 Wn.2d at 941. In order for public policy to be "genuinely threatened," there must necessarily be an absence of alternative adequate remedies to protect the public policy. Id. Whether employee action is considered "directly related to" or "necessary for the effective enforcement of" the public policy, employer conduct cannot be said to jeopardize the public policy if adequate means already exist to protect the public policy. That is to say, even in a direct-relationship case, if other adequate means of protecting the public policy exist (e.g. a legislatively-created process designed to safeguard the policy, like in WISHA), there is no need to create an additional layer of protection through a wrongful discharge tort.

Notably, this Court examined whether adequate alternative means were available to protect the public polices at issue in Gardner, even

[1] The WSAJ Foundation claims that in his treatise, cited previously by this Court, Perritt does not include any reference to alternative means of promoting public policy. WSAJ Foundation Brief at page 9. In fact, it is discussed. See Henry H. Perritt, Jr., Workplace Torts: Rights and Liabilities (1991) at section 3.14 (page 77) (cited in Gardner, 128 Wn.2d at 945).

though it was a "direct-relationship" case: "Gardner's responding to the hostage situation ***directly served*** both the good Samaritan policy and the policy of saving lives." Gardner, 128 Wn.2d at 945. The Court proceeded to analyze whether there were alternative means of promoting the public policy as part of its jeopardy analysis: "As Gardner testified in his deposition, when he saw the manager being chased by the suspect, he looked around the parking lot and saw no one else 'in a position to help.'.... [A]nd there were still no police or other persons available to help the woman." Id. at 946. The Court then found that the jeopardy element was met. Id.; see also Danny v. Laidlaw Transit Servs., Inc., 165 Wn.2d 200, 223-24, 193 P.2d 128 (2008) (discussing Gardner's "jeopardy" analysis as including an examination of alternative means, such as whether the "truck driver needed to leave his vehicle, including the screams and pleas for help of the woman as she was chased with a knife, the position of the truck, and the fact that no one else seemed ready to help").

The WSAJ Foundation cites Ellis v. Seattle, 142 Wn.2d 450, 13 P.3d 1065 (2001), as "exemplifying" a direct- relationship case. It hypothesizes that "*[p]resumably* because the refusal to disable the PA system was directly related to the public policy, the Court did not engage in any consideration of alternative means, such as calling the fire department to inquire or complain." (WSAJ Foundation Brief at p. 11)

(emphasis added). Contrary to the WSAJ Foundation's assertion, Ellis was not a "direct relationship" case; it was a "necessary for enforcement" case, and was analyzed as such by both the Court of Appeals and Supreme Courts.

In an unpublished opinion, the Court of Appeals treated it as a "necessary for enforcement" case and did, in fact, look to whether enforcement was necessary under the circumstances. See Ellis, 142 Wn.2d at 463. On further appeal, this Court proceeded to undertake the same "necessary for enforcement" analysis, holding that there were fact issues as to whether the plaintiff's conduct was truly "necessary," because additional safety checks, including the requirement of obtaining authorization from the fire department, were purportedly in place at the time the plaintiff was asked to disable the PA system. Ellis, 142 Wn.2d at 463; see also Danny, 165 Wn.2d at 223-24 (recognizing that Ellis was a "necessary for enforcement" case and was analyzed by the Court as such).

The WSAJ Foundation concedes, as it must, that subsequent decisions of this Court analyzed the adequacy of alternative remedies in wrongful discharge cases, without distinction as to "direct relationship" or "necessary for enforcement" issues.

In Hubbard v. Spokane County, 146 Wn.2d 699, 50 P.3d 602 (2002), the Court articulated the test for the "jeopardy" element as

requiring an analysis of whether there were adequate alternative means of enforcement.

> To establish the jeopardy element, a plaintiff must show he or she "engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the policy. ***This requires the plaintiff to argue that other means for promoting the policy are inadequate.***

Id. at 713 (internal citations omitted) (emphasis added). The Court proceeded to analyze whether adequate alternative means were available to the plaintiff. Id. at 716-17.

In Korslund v. Dyncorp Tri-Cities Servs., 156 Wn.2d 168, 125 P.3d 119 (2005), this Court again recited the test for the jeopardy element of a wrongful discharge in violation of public policy claim as including the "alternative means" requirement without limitation:

> In order to establish jeopardy, "a plaintiff must show that he or she 'engages in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy.'" The plaintiff has to prove that discouraging the conduct that he or she engaged in would jeopardize the public policy. ***And of particular importance here, the plaintiff must also show that other means of promoting the public policy are inadequate.***

Id. (internal citations omitted) (emphasis added). This Court went on to decide the issue on the basis of adequate alternative remedies under the Energy Reorganizational Act ("ERA"), despite urging from the dissenting

Justice, who may have argued for the same distinction requested now by the WSAJ Foundation. See id. at 193-94 (J. Chambers dissenting).

The WSAJ Foundation concedes that the Court in Korslund applied the "alternative means" requirement, despite its recognition that the case could be considered a "direct relationship" case because the ERA contained an express anti-retaliation provision for making reports of safety violations. WSAJ Foundation Brief at p. 13. WSAJ attempts to explain-away the Court's analysis, which it criticizes as an incorrect application of Gardner, as being "guarded" and a by-product of this Court's tendency to strictly limit wrongful discharge torts. Id. at p. 14. Indeed, the Court has recently confirmed that the "jeopardy" element "strictly limits the scope of claims under the tort of wrongful discharge." Danny, 165 Wn.2d at 221.

In Danny, the Court, *again*, articulated the "jeopardy" element as including an analysis of "adequate alternative means," without limitation:

> To satisfy the "jeopardy" element, the employee "must prove that discouraging the conduct in which she engaged would jeopardize the public policy." This Court was careful to note in Gardner that in order to satisfy the jeopardy element, the employee must show that her conduct "directly relates to the public policy, or was necessary for the effective enforcement of the public policy." ***Accordingly, the employee must show that other means of promoting the policy are inadequate. The "jeopardy" element strictly limits the scope of claims under the tort of wrongful discharge. In this case, for example, in order for Danny to show that her conduct***

> ***satisfies the "jeopardy" element, she will have to show that the time she took off work was the only available adequate means to prevent domestic violence against herself or her children or to hold her abuser accountable.***

Danny, 165 Wn.2d at 223 (internal citations omitted) (emphasis added). The Court added that this inquiry turns on the nature of the danger, the actions she took, and the details of her work schedule, which would determine whether missing work was the "only adequate means of protecting herself and her children." Id.

The WSAJ Foundation urges a return to Gardner and argues that Korslund should be overruled. The WSAJ Foundation fails to demonstrate that the concern for safeguarding public policy is any less applicable to "direct relationship" cases than "necessity of enforcement" cases. Moreover, the WSAJ Foundation fails to establish either requirement for this Court to abandon its precedent under the doctrine of *stare decisis*: that the decision is incorrect and harmful. In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

First, this Court's decision in Korslund is not wrong. As discussed, the WSAJ Foundation's reliance on Gardner to support its argument is misplaced, because the Gardner Court *did* analyze alternative means of enforcement. The Court subsequently followed this structured analysis in the Hubbard, Korslund, Ellis, and Danny cases, applying the

"alternative adequate means" analysis, regardless of whether it was a "direct relationship" or "necessary for enforcement" case. The distinction urged by the WSAJ Foundation simply does not exist in Gardner or subsequent cases; rather, the Court has required every wrongful termination plaintiff to establish the absence of adequate alternative means of enforcement.

Moreover, the WSAJ Foundation has failed to demonstrate that the requirement is somehow harmful. To the contrary, the Court's established analysis and the "alternative adequate means" requirement meets the goal of maintaining wrongful termination as a narrow exception to Washington's at-will employment status: "The jeopardy element guarantees an employer's personnel management decisions will not be challenged ***unless a public policy is genuinely threatened.***" Gardner, 128 Wn.2d at 941-42 (emphasis added). While the WSAJ Foundation argues this imposes upon a wrongful termination plaintiff an additional hurdle, it fails to recognize that the requirement furthers the ultimate goal of the "jeopardy" requirement. The WSAJ Foundation has also failed to demonstrate that this concern is any less applicable in "direct relationship" cases.

In passing, the WSAJ Foundation posits that if Cudney must prove the inadequacy of other means of enforcing public policy, the requirement

is met. WSAJ Foundation Brief at page 19. It then compares the remedies under WISHA with those under the ERA, as discussed in Korslund. Like Cudney and the other Amici, the WSAJ Foundation fails to show that WISHA remedies are inadequate to protect the public policy of workplace safety. Because some remedies are not specifically set forth in WISHA does not mean its remedial statutory framework is inadequate. The Legislature should be afforded great deference in this arena.

According to Perritt, the commentator cited by the WSAJ Foundation, "when the statute allegedly supplying the public policy provides administrative remedies, the jeopardy element for the plaintiff is much weakened. The jeopardy element is difficult to satisfy when the public policy is drawn from a labor statute that provides its own enforcement mechanisms." Perritt, section 3.15, page 78.

2. Washington's DUI Laws Adequately Protect Public Policy.

The WSAJ Foundation agrees that because Cudney's claim based on the DUI laws deals with the "necessary enforcement" of public policy, he must show that the DUI laws are inadequate to protect the public policies underlying the DUI statutes. However, it incorrectly asserts that ALSCO proposes a *Catch-22,* insofar as "the mere existence of any alternative remedy would foreclose a wrongful discharge claim." WSAJ Foundation Brief at page 21. The alleged *Catch-22* is not proposed by

ALSCO and does not exist. While Cudney had the option to report his DUI suspicions to law enforcement or ALSCO management, the existence or non-existence of a tort claim was not dependent on his decision. Rather, a tort claim only exists if he can show that other means of protecting the underlying public policy were inadequate. This standard has been the law in Washington for some time and is not something new proposed by ALSCO.

The WSAJ Foundation also posits that had Cudney reported his concern to law enforcement, which it is undisputed he did not, ALSCO would have claimed he should have reported it to L&I. This has never been ALSCO's position. In making this claim, the WSAJ Foundation confuses the relationship between WISHA and the DUI laws. Although tangentially related under the facts of this case, these statutes protect different public policies and are therefore to be separately analyzed. Concisely stated, ALSCO's position is that the public policy embodied in WISHA is adequately protected by the legislatively-created remedies afforded aggrieved employees under that statute. Similarly, DUI enforcement statutes adopted by the Legislature adequately protect the public policy against drunk driving. As such, Cudney cannot show that existing remedies are inadequate to protected the public policies reflected in WISHA and the DUI statutes.

Next, the WSAJ Foundation suggests, without any authority or data, that current DUI laws (and WISHA) are ineffective to protect the relevant public policies. WSAJ Foundation's Brief at page 22. It argues it was more efficient for Cudney to report his concerns of a DUI in progress to ALSCO management, rather than to utilize the reporting mechanisms available to all citizens under the DUI and other criminal justice statutes. There is nothing in the record that even suggests this to be the case. It seems clear that law enforcement was in a much better position on the day in question to deal with Cudney's DUI concern and to take necessary law enforcement measures to protect the public, than was ALSCO's Human Resource department. Contrary to the WSAJ Foundation's suggestion, encouraging an employee to first report a suspected crime to management, rather than law enforcement, diminishes the chances that the crime can be stopped, thus placing the public's interest in greater jeopardy. In any event, the Court cannot assess the effectiveness of the relevant statutes in the absence of any evidence.

Further, the WSAJ Foundation asserts that the DUI laws provide Cudney with "no remedy" in this case. Id. at page 23. As the protection of public policy is paramount, Cudney need not have an individual remedy if the DUI statutes are adequate to enforce the public policy against drunk

driving. It is only if he proves that the DUI laws are inadequate that the Court will recognize his wrongful discharge claim.

Finally, the WSAJ Foundation argues that relying on law enforcement and the criminal justice system to deal with DUI claims "leaves the enforcement of public policy up to chance." WSAJ Foundation Brief at page 24. There is nothing in the record to support this bold assertion, and ALSCO is confident that law enforcement would take strong exception to this unfounded charge. Law enforcement is under a sworn duty to uphold and enforce the laws of this state, and it certainly should and can be expected to have acted swiftly and appropriately had Cudney elected to report his DUI concern to law enforcement via a 9-1-1 call or any other method.

C. ALSCO's Response to WELA's Amicus Brief.

WELA would have the jeopardy analysis focus on injury to the individual employee, rather than protection of the public. This would require the Court to completely transform the nature of a claim of wrongful discharge in violation of public policy, focusing on injury to the employee rather than protection of public policy. WELA's proposed rule would effectively transform the "narrow" tort of wrongful discharge in violation of public policy, to a broad tort designed to protect injured employees.

WELA's proposed rule can be summed up as follows: "The fundamental inquiry should be whether the statutory or administrative remedies and process adequately protect the injured employee." WELA Brief at page 18. Based on this statement, WELA effectively asks this Court to overrule numerous prior decisions, including Hubbard v. Spokane County, 146 Wn.2d 699, 717, 50 P.3d 602 (2002), where the Court held that "other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy." WELA Brief at pages 2-3. The Court should decline WELA's request.

WELA's position has been considered, and previously rejected, by this Court. As stated above, in the case WELA seeks to overturn (Hubbard), the Court made it clear the focus of the inquiry should not be on compensation for an aggrieved individual, but instead on whether other adequate means exist to protect the public policy. Even more pointedly, in Korslund, the Court noted that cases from other jurisdictions addressing the adequacy of remedies under the ERA focused on the adequacy of the remedy for the injured employee "rather than whether the public policy is adequately protected." Korslund, 156 Wn.2d at 183 n.2. This Court has consistently focused on the adequacy of other means of protecting the public policy, recognizing that when such a remedy exists, there is no

separate tort, even if the public-policy protecting remedy does not provide full and complete redress to an aggrieved individual.

WELA suggest that the position advanced by ALSCO would require the Court to overrule Thompson v. St Regis, 102 Wn.2d 219, 685 P.2d 1081 (1984). This is incorrect. As stated, focusing on whether a particular remedy fully compensates an injured employee, rather than whether it adequately protects the public policy, as WELA suggests, is in direct contravention to Thompson and its progeny. Further, unlike this case, in Thompson, the plaintiff alleged he was fired because he insisted his employer follow the Foreign Corrupt Practices Act, not for reporting that he believed a crime had been committed. The adequacy of the Foreign Corrupt Practices Act as a remedy to protect the public policy was not at issue, as the plaintiff did not report a violation of the Act to management, as opposed to law enforcement.

D. ALSCO's Response to L&I's Amicus Brief.

L&I claims that under Wilmot, there are two separate causes of action under the industrial insurance discrimination statute: (1) a private right of action for wrongful discharge in violation of public policy and (2) the Department's state action under RCW 51.48.025. Wilmot, which was decided well before both Gardner and Korslund, does not stand for this proposition.

As discussed in ALSCO's initial brief, Wilmot was decided under an exclusivity analysis. ALSCO's Response Brief (July 13, 2009) at pages 29-33. The Court in Korslund specifically addressed Wilmot's exclusivity analysis, finding it very different than the question before it relating to the existence of the jeopardy element. In reversing the Court of Appeals' ruling, which relied upon Wilmot, this Court found that the Court of Appeals had "confused two distinct legal issues." Korslund, 156 Wn.2d at 183. L&I's analysis, like Cudney's, suffers the same defect. Because Wilmot does not stand for the proposition cited by L&I, it was not overruled in Korslund and need not be overruled here. The Court in Wilmot simply was not presented with the same issue now before this Court.

L&I maintains that Wilmot "essentially considered the Jeopardy element when it addressed the adequacy" of the WISHA remedy. L&I Brief at page 8. However, as discussed, the central issue in Wilmot was materially different. As pointed out in Korslund, the question in a jeopardy analysis is not "whether the legislature intended to foreclose a tort claim," as analyzed in Wilmot, "but whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy." Korslund, 156 Wn.2d at 183. As Wilmot did not analyze whether WISHA provides an

adequate means to protect the public policy it embodies, its exclusivity analysis provides little guidance to the salient issue here.

L&I admits that when it undertakes a claim under WISHA, it does so to protect public policy. L&I Brief at page 10-11. It also recognizes the appropriate role of the Legislature in setting public policy and defining remedies for a WISHA violation: "certainly, the Legislature chose 30 days as a reasonable amount of time to file complaints with the Department, and this Court should defer to the Legislature on matters of policy, such as a statutory deadline for filing a complaint with an administrative agency." L&I Brief at p. 14.

Attempting to divine what the Legislature intended, L&I asserts that the 30-day claim period[2] "shows that the Legislature recognized that there was a pre-existing private common law remedy and only meant RCW 49.17.160 to supplement the existing claims and tort with an investigative process, not to exclude them." L&I's Brief at p. 14. L&I's opinion concerning what the Legislature intended in enacting RCW 49.17.160 does not aid this Court in resolving the certified questions. Nor is it relevant that L&I promulgated its regulations "with the understanding

[2] ALSCO asserts that the L&I statistics offered by WELA are irrelevant and should not be considered in these proceedings. But if the Court does consider them, it is noteworthy that they show about 87% of the claims received by L&I are timely filed. WELA Brief at page 19. Thus, the vast majority of WISHA complaints received by L&I were timely submitted, despite the 30-day period.

that a complainant has a private action for wrongful discharge and violation of public policy." L&I's Brief at p. 18.

L&I also opines that the remedies the Legislature empowered it to seek may not include all possible remedies available to a tort claimant. This may or may not be the case, but is of little consequence under the jeopardy analysis. The issue is not whether all remedies are available to a claimant, but whether public policy is adequately protected. The Legislature should be given great deference in determining whether it formulated an adequate regulatory plan under WISHA to protect the public policies identified thereunder.

What is more, L&I recognizes that under WAC 296-360-020, the Department "interprets 'shall' in 49.17.160 to mean that the Director must assure that enforcement of the WISHA discrimination statute occurs." L&I Brief at page 18. Since L&I is charged with protecting the public policy embodied in WISHA, it cannot be said that the available remedies are inadequate.

Undoubtedly, the Legislature weighs important public policy considerations when it crafts legislative protections and remedies. Since not all public policies rise to the same level, it is incumbent on the Legislature, as the voice of the people in our democratic process, to allocate appropriate weight and protection to each specific policy it

recognizes. If, for example, the Legislature provides 30-days to file a claim in one instance, and three years in another, it should be presumed it had a sound, policy-based reason to differentiate the claims in the manner it did. It should not be assumed, as suggested by L&I, that a 30-day claim period meant that the Legislature intended a private right of action to also exist. There is nothing upon which to base this assumption.

IV. CONCLUSION

For the reasons stated herein, this Court should answer "yes" to both certified questions.

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CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I HEREBY CERTIFY that on January 4, 2010, a true and correct copy of the foregoing Respondent ALSCO's Objection to Motions for Leave File Amicus Curiae Brief was electronically mailed to:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Katie Simonson

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